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In the Supreme Court of the United States

October Term, 1939.

No. 129

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,
Petitioner,

vs.

EL DORADO TERMINAL COMPANY, a corporation,
Respondent.

Petitioner's Reply to Brief for Respondent in Opposition to Petition for Writ of Certiorari.

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INTRODUCTORY STATEMENT.

In the petition and supporting brief it was shown that the decision sought to be reviewed involves an important question of federal law which has not been, but should be, settled by this Court. It was further shown that the decision is in conflict on principle with applicable decisions of this Court and that it is directly antagonistic to the con-

sensus of pertinent authority, represented by decisions of other federal courts and of the Interstate Commerce Commission. It was pointed out that if the decision is allowed to stand it will result

(1) in frustrating the efforts of the Commission to eliminate objectionable practices in the use of private cars, and

(2) in giving judicial sanction to the employment of private cars as a means of rebating, discrimination and preference.

Specifically, the decision of the Circuit Court of Appeals goes the full length of holding that a "profit" realized by a shipper-lessee of privately owned railroad tank cars, measured by the excess of the car mileage allowances made by the rail carriers for the use of the cars above the amount of the shipper's car rental and incidental costs, if any, is not a rebate forbidden by the Elkins Act. Irrespective of the shipper's costs, and irrespective alike of the amount of the "profit", the Circuit Court holds that such "profit" rightly inures to the shipper as the legitimate fruit of his favorable arrangement with the car owning company. In no case heretofore has it been so held. Respondent has not challenged, and manifestly it could not challenge, the accuracy of this characterization of the holding of the Circuit Court.

The factual presentation in the petition and supporting brief is not criticized by respondent. Respondent does not deny that the car mileage earnings which accrued on the leased cars during the period covered by the suit were

approximately twice the amount of the shipper's car rental. The car rental provided by the contract was $27.50 to $30.00 per car per month and the car mileage earnings were at least twice that sum (Petition, pp. 6-7). Respondent does not, and plainly cannot, represent that the record discloses any costs, other than car rental, in fact incurred by the shipper in the use of the leased cars. Accordingly, respondent is of necessity asserting its right to secure a "profit" amounting to not less than $27.50 per car per month through its arrangement with the car owning company for the use of privately owned cars for the transportation of its shipments in interstate commerce.

The only issue raised in this case is directed to the legality, under the Elkins Act, of the shipper's profit measured by the excess of the car mileage paid by the rail carriers over the car rental payable by the shipper-lessee. There is no controversy as to the material facts. The parties were agreed, in the trial of the case in the District Court as well as in the presentation to the Circuit Court, that but a single issue of law is involved. In the reply brief filed by appellant (respondent herein) with the Circuit Court it was expressly recognized that "there is but a single issue, and that purely one of law". That issue was raised by the petitioner's plea in defense and is restricted to the legality of payments, by a car owner-lessor to a shipper-lessee, of car mileage allowances received from the rail carriers in amounts exceeding the shipper's car rental.

The issue is of outstanding public importance and properly requires authoritative determination by this Court, to

the end that privately owned cars may not become authorized instruments of rebating and discrimination.

I.

ILLEGALITY OF PAYMENT BY CAR OWNING COMPANY TO SHIPPER-LESSEE OF CAR MILEAGE ALLOWANCES RECEIVED BY CAR OWNING COMPANY FROM RAIL CARRIERS IN AMOUNTS EXCEEDING CAR RENTAL AND INCIDENTAL COSTS, IF ANY, OF SUCH SHIPPER-LESSEE.

The legal thesis advanced by the petitioner is essentially this:

> A car owning company is precluded by the Elkins Act from paying over to a shipper-lessee, and the latter is prohibited from receiving, car mileage payments received by the car owning company from the rail carriers for the use of leased cars in interstate commerce in amounts exceeding the car rental and other costs, if any, of such shipper-lessee, in that thereby the shipper-lessee would obtain a rebate or concession in respect to its shipments.

In the petition and supporting brief we have shown that the position thus taken by the petitioner is responsive to the terms and purpose of the statute, as declared in authoritative cases. It stems from the generic principle that irrespective of form, and irrespective of the means employed, a shipper is not permitted to receive either from the carrier or from an intervening third person any pay-

ment which will have the effect of lowering his transportation costs below the lawfully established tariff charges. By express terms the law subjects all privately owned cars to the provisions of the Act to the same extent as railroad owned cars, plainly forbidding their use in such fashion as to enable shippers or receivers to secure rebates, concessions, preferences or advantages in any form.

We shall refrain from retraversing ground already covered but shall undertake merely to show that respondent has failed to meet the case tendered by the petition. Respondent seeks rather to avoid petitioner's case.

Preliminarily we shall comment briefly upon certain matters of fact.

A. Factual Matters.

We have pointed out that respondent has not questioned the petitioner's presentation of the essential facts. We may take it therefore that the accuracy of that presentation is conceded. The petitioner, however, must take exception to the treatment of facts by respondent in respects which may be material.

(1) It is stated upon page 2 of respondent's brief that "the published and filed tariffs of all railroad carriers provided that the railroads would not furnish these tank cars for transportation purposes (R. 163, 167, 201) * * *". This characterization is inaccurate. The apparent implication is that in practice the rail carriers have never furnished shippers with such tank cars (Respondent's brief, p. 11). Such is not the case.

The pertinent tariff item of the rail carriers is in these terms:

> "The rates provided for freight in tank cars do not obligate the carriers to furnish tank cars." (R. 201)

While the carriers thus do not "obligate" themselves to furnish tank cars, they do upon occasion supply tank cars to shippers for the transportation of vegetable oils as well as other products, as shown by the record in this case (R. 164-168).

The point in any event is completely irrelevant to the issue presented. The statute expressly provides that *all* cars "irrespective of ownership or of any contract, express or implied, for the use thereof" are subject to the provisions of the Act, alike with cars of railroad ownership. The fact that the carriers do not obligate themselves to supply tank cars to meet the needs of all shippers can not serve to justify the use of privately owned tank cars as instruments of rebating and discrimination.

(2) Respondent's brief purports to quote language from the car mileage tariffs of the rail carriers providing for a mileage allowance of 1½¢ per mile "to the car owner or to the party who has acquired the car or cars" (Respondent's brief, p. 2). The quotation is incomplete and for that reason may give rise to erroneous impressions. Respondent makes a later reference to "certain other requirements set forth in the regulations" (Respondent's brief, p. 17) but omits the text of these "certain other requirements."

Upon reference to the first of the tariff items upon which respondent relies (R. 192) it will be found that the

language reproduced by respondent is followed by the words "as shown by the permanent reporting marks * * *". The qualifying terms are material, inasmuch as the tank cars here involved bore the reporting marks of the *car owner* (petitioner herein) and not those of the respondent El Dorado Company. All succeeding tariff items contain language effectively precluding any claim on the part of the respondent El Dorado Company that the car mileage was payable to it under the terms of the tariffs (R. 192-198). Moreover, the tariff item which was in effect after April 1st, 1935, and therefore during the last two months of the period covered by this suit, contained the additional provision that mileage would be paid "only to the car owner—not to a lessee" (R. 197).

Throughout the entire period covered by this suit the car mileage tariffs of the rail carriers were so phrased as to require payment of car mileage to the Car Corporation (the petitioner) and not to the respondent El Dorado Company. In brief, the El Dorado Company has had no standing at any time to demand payment to it of the car mileage allowances under the applicable terms of the mileage tariffs of the rail carriers. It is wholly misleading for respondent to represent that "there is nothing in the railroad tariffs or rules of the Interstate Commerce Commission preventing such compensation by the rail carrier to the *shipper-supplier* directly" (Respondent's brief, p. 19). The fact is that the railroad tariffs did not sanction such compensation by the rail carrier to the respondent El Dorado Company.

(3) Respondent argues that the record does not show that discrimination among shippers would result from the payment to respondent of the full amount of the car mileage allowances which accrued upon the leased cars. Nevertheless respondent's brief recites that the Car Corporation "had numerous tank cars leased out to other shippers of vegetable oils throughout the whole Pacific Coast" and further suggests that there is nothing to show "that all such shippers did not have contracts with car companies similar to the one sued upon in this case" (Respondent's brief, p. 12). It is plain from these recitals that discrimination among shippers is not only probable but certain if the position of the respondent should be upheld, since it is inconceivable that all shippers would hold contracts from car owning companies upon equally favorable terms and that they would enjoy "profits" in equal measure from the use of the leased cars, thereby assuring a parity in net transportation costs.

But the particular point is again immaterial to the main issue. The question presented is whether a shipper-lessee, as the beneficiary of car mileage payments in excess of his outlay for car rental and other costs, if any, thereby has his transportation costs reduced below the lawful tariff charges, thus receiving a rebate or concession. It would seem clear beyond the possibility of controversy that if the car rental payable by the shipper is $30 per car per month, but he receives car mileage allowances from the car owning company to the extent of $60 per car per month, his transportation charges have been reduced in the amount of such excess payment of $30 per car. Heretofore the cases have so held.

The Elkins Act makes rebating a separate offense and it is therefore immaterial whether discrimination is also shown (*Chicago St. P., M. & O. Ry. Co. v. U. S.* (C.C.A. 8) 162 Fed. 835, 839; certiorari denied, 212 U. S. 579).

(4) Respondent is unable to point to any evidence of record showing that respondent incurred any costs, additional to car rental, in the use of the leased cars. Respondent does not assert that it sustained any such additional costs in fact. Emulating the Circuit Court, respondent is content to suggest, *without the slightest record support*, that "costs and obligations in addition to rental actually did exist" (Respondent's brief, pp. 20, 24).

An effort is made to defend the Circuit Court for having *assumed* costs even though they are not shown of record. For reply it will suffice again to say that respondent at no time, either in the District Court or in the Circuit Court of Appeals, asserted or claimed costs additional to car rental. The case was presented by both parties upon the basis that car rental was the only cost incurred by the respondent in connection with the use of the leased cars. Respondent does not contend to the contrary even at this time. It does not assert that, either by its assignment of errors or otherwise, it has represented to the Circuit Court that it incurred any costs, other than car rental, in connection with the use of the leased cars. It was not in order for the Circuit Court to indulge in purely speculative assumptions as to "other costs and obligations" which respondent asserts are "matters of common knowledge" (Respondent's brief, p. 23). These were not "matters of common knowledge" and, as pointed out in the brief sup-

porting the petition, they are to a large extent demonstrably contrary to fact (Brief in support of petition, pp. 36-37).

Such other errors of fact in respondent's brief as appear to be of moment will be noticed in the course of the ensuing discussion.

B. The Authoritative Cases.

Petitioner has relied upon certain decisions which have always been recognized as authoritative and which cannot be reconciled with the decision here sought to be reviewed. Respondent's brief purports to distinguish these cases. According to our view, the attempted distinctions are wholly abortive.

Respondent repeatedly suggests that the payment of the excess car mileage earnings to respondent is not prohibited by any rule, regulation or order of the Interstate Commerce Commission (Respondent's brief, pp. 6, 7, 9, 11, 13, 17, 19). Thus respondent fails to appreciate or express the real issue. The payments demanded would not be unlawful by virtue of any rule, regulation or order of the Commission; they would be unlawful solely because of the prohibitions of the Elkins Act. In point of fact the Commission has never promulgated any rule, regulation, or order forbidding such payments, either as to refrigerator cars or any other type of equipment. It has merely set forth the requirements of law. The requirements so expressed are not lightly to be disregarded by carriers, car owning companies or shippers.

Respondent correctly understands that the petitioner lies definitely upon the report of the Interstate Commerce Commission in the case here cited. The ruling of e Circuit Court in the instant case is in direct hostility the conclusions of the Commission as to the requirements of the law in the use of privately owned cars. The nflict has been shown in our petition and supporting ief.

Attempting to distinguish, respondent represents that the *Refrigerator Car case* "The question considered d decided was as to the reasonableness of the allowance paid on refrigerator cars * * * " (Respondent's brief, 10). Respondent is in error. The Commission made no cision as to the *reasonableness* of the allowances paid r the use of refrigerator cars, nor did it promulgate any le or regulation controlling payment of these allowances. t the Commission did find and conclude, *inter alia*, as own on pages 24 and 25 of the brief supporting the tition herein, that the payment to shippers "of mileage rnings by railroads either direct or through car owners excess of the amount of rental said shippers pay for e use of the cars and other actual expenses in connecon therewith results in such shippers receiving transportion of their products at lower rates than those paid by ippers generally who use cars furnished by the carriers d at less than the published rates".

The Commission also announced that "the general prinples enunciated apply equally to all other types of prite cars" (Brief in support of petition, p. 25).

The Commission's investigation was directed mainly to practices in connection with the use of refrigerator cars. The case is important because of its declaration of essential principle, and that principle is simply that privately owned cars may not be used as instruments of rebating, concession or discrimination. Specifically, they may not be so used as to enable a shipper to obtain, through the receipt of car mileage allowances in excess of car rental and other costs, a reduction in tariff charges for the transportation of freight.

Respondent represents further that it appears from the evidence in this case that "the full tariff freight rates were paid to the railroads by the consignees of all the coconut oil shipped by respondent in its leased tank cars" (Respondent's brief, p. 12). This is not a point of distinction. The fact is that shippers of freight in refrigerator cars have paid full tariff freight rates to the rail carriers and yet the Commission has condemned the payment of car mileage to such shippers in amounts exceeding car rental and other costs because such excess payment is in effect a reduction in transportation charges.

Privately owned tank cars are indistinguishable from privately owned refrigerator cars or cars of any other type. The principle announced by the Commission is simply that the privately owned car may not be used as a means by which to accomplish an indirect remission of lawful tariff rates. Respondent fails to recognize the generic character of this principle.

(2) Interstate Commerce Commission v. Reichmann, 145 Fed. 235.

Respondent undertakes to distinguish the decision in the case here cited by stating that the Car Company *"rented its cars to the railroads"* and that "The railroads furnished them, as it did other cars owned by them, to shippers" (Respondent's brief, p. 14). The attempted ground of distinction is wholly superficial. The substantial fact is that the car owning company was supplying cars under arrangements whereby the shippers received a portion of the car mileage allowances made by the carriers for the use of the cars, thereby indirectly reducing the shippers' transportation costs below the lawful tariff charges. This was the practice condemned by the court as unlawful rebating, forbidden by the Elkins Act. In substance the case here presented is identical, since the shipper is demanding the payment of car mileage allowances, received by the car owning company from the rail carriers, even though such mileage allowances substantially exceed the car rental payable by the shipper. Under the legal principle declared in the *Reichmann case*, as shown in the brief supporting the petition herein, payment of such excess car mileage earnings to the shipper, irrespective of the form of the arrangement, would be in violation of the Elkins Act.

Respondent also refers to the Hepburn Amendment of 1906 to the Interstate Commerce Act and implies that practices of the character held unlawful in the *Reichmann case* have been validated by that amendment (Respondent's brief, p. 15). Respondent has misconceived the purpose and effect of the amendment. It will suffice here to

refer to the discussion on pages 27 and 28 of the brief supporting the petition, wherein it is shown that neither the Hepburn Act nor the 1917 amendment to the Interstate Commerce Act legalized any practice which theretofore had been held to be in violation of the Elkins Act.

(3) Spencer Kellogg and Sons v. U. S., 20 Fed. (2d) 459.

Respondent states that in the case here cited the payment by the elevator company to a shipper of a portion of the elevation allowance received from the rail carriers for the elevation of grain in transit "was clearly a rebate by an interstate carrier and the Court sustained the conviction on that ground" (Respondent's brief, p. 16). Respondent has misapprehended the holding of the court. It was not held that the payment was "a rebate by an interstate carrier". On the contrary, the court expressly recognized that the elevator company was not a carrier, as shown by the following excerpts from the opinion:

> "The writ presents the question of whether a corporation, *other than a carrier* who acts in performing interstate transportation service, commits a breach of the laws referred to by giving such concessions and rebates." (p. 460)
>
> • • • • • • • •
>
> "Congress intended to prohibit *all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers.*" (p. 461)
>
> • • • • • • • •
>
> "*The test* to be applied in determining whether the act is violated *is whether the terms of the statute include the acts committed. Whether the person com-*

mitting the act is a shipper or carrier is not determinative. United States v. Koenig Coal Co., 270 U. S. 512, 46 S. Ct. 392, 70 L. Ed. 709." (p. 461) (Emphasis supplied.)

The foregoing will suffice to show that the prohibitions against rebating are not confined to shippers and carriers only but extend to all persons. As pointed out in the brief supporting the petition (p. 30), the ruling principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device to defeat tariff rates or obtain an advantage.

(4) Cases relied upon by respondent.

Respondent cites the decision of the United States District Court (Judge Bourquin) in *U. S. v. Peterson*, 1 Fed. (2d) 1018. In that case a railroad ticket agent, who had embezzled passenger tickets from the railroad company by which he was employed and had sold the tickets at a reduced price, was indicted for alleged violation of the Interstate Commerce Act and the Elkins Act. The court held that "petty embezzlements and sales of tickets by the carriers' subordinate employees" were not within the terms or intent of the statutes. Assuming the correctness of the ruling, it is clearly irrelevant to the issue here.

Respondent also cites *U. S. v. Durkee Famous Foods, Inc.*, 17 Fed. Supp. 846. In that case a shipper was indicted for receiving an alleged rebate by reason of failure to pay an established tariff rate for the pumping of oil from a barge to railroad cars. The court ruled that the indictment failed to show that the tariff charge for this

service had actually become payable under the rules of the applicable tariffs. The case is not remotely relevant.

Upon pages 8 and 18 of its brief respondent cites four cases, commencing with *U. S. v. Baltimore & Ohio Railroad*, 231 U. S. 274. None of the cases cited is in point, nor does respondent undertake to show wherein they are pertinent. They hold merely that one who supplies a service or facility to rail carriers may receive compensation in conformity with the terms of the applicable tariffs, if the amount paid or received is not unreasonable and if it does not result in discrimination or in a rebate or other concession in violation of the Elkins Act. This principle is not disputed. In none of the cases cited did it appear that payment of the allowance would result, either directly or indirectly, in violation of the Elkins Act. We have already pointed out that under the terms of the applicable tariffs of the rail carriers in the instant case the car mileage earnings were payable by the carriers to the car owner (petitioner herein) and not to the respondent El Dorado Company. It has also been shown that payment of the car mileage in full by the Car Corporation to the El Dorado Company would result in a reduction in the latter's transportation charges below the lawful tariff rates.

Respondent cites no other cases. It has failed to discover or present any decision of any court whatever supporting the doctrine of the decision here sought to be reviewed. Respondent has failed to cite a case in opposition to any of the authorities upon which petitioner relies. We must take it accordingly that no opposing decision could be found.

We repeat that the decision of the Circuit Court of Appeals herein is opposed to the entire current of authority and that it is without precedent or counterpart in the history of common carrier regulation. Never heretofore has it been held or suggested that a shipper, by becoming a lessee of privately owned cars, may lawfully enjoy a "profit" represented by the excess of car mileage revenue received by the car owning company over the costs incurred by the shipper in obtaining and using the cars.

C. The Car Mileage Tariffs.

Respondent labors to defend the conclusions of the Circuit Court as to the construction and effect of the car mileage tariffs of the rail carriers (Respondent's brief, pp. 17-19). It is exceedingly plain, however, that the court's treatment of the car mileage tariffs is not susceptible of defense upon any theory. This has been demonstrated upon pages 30 to 32, inclusive, of the brief in support of the petition.

We would again point out that this suit was not brought to enforce the provisions of the carriers' car mileage tariffs. It is rather a suit to recover upon a contract between a shipper and a car owning company. However, the Circuit Court of Appeals was so misled by the contentions of the El Dorado Company that it rested its decision largely upon a mistaken understanding of the tariff provisions and their effect. Initially it upheld the shipper's right of recovery primarily upon the ground that under the provisions of the applicable tariffs of the rail carriers the car mileage allowances were payable to the shipper

(R. 329). We have pointed out that the tariff provisions did not so provide (Brief in support of petition, p. 30). The error of the court in interpreting the tariffs was brought to its attention in the petition for rehearing. Thereupon the court, in its supplementary opinion, declared that "we must *assume* that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (Brief in support of petition, p. 31). The assumption thus indulged was wholly contrary to the record, since the applicable rules of the car mileage tariffs are in the record, at the instance of the El Dorado Company, and are specifically identified by stipulation of counsel (Brief in support of petition, p. 31).

Respondent's treatment of the record in this respect serves merely to confuse and obscure. Respondent does not argue in explicit terms that the mileage earnings were payable to it under the terms of the car mileage tariffs, but seeks rather to create this impression by indirect suggestion or inference. Thus it is stated that under the terms of the car mileage tariffs the mileage earnings would be paid to the car owner or to the person who had acquired the cars "and had fulfilled certain other requirements set forth in the regulations" (Respondent's brief, p. 17). But respondent fails to point out the nature of these "certain other requirements" and that specifically, throughout the entire period covered by the suit, the car mileage was payable only to the party whose "reporting marks" were on the cars. Respondent also fails to point out that the "reporting marks" were those of the Car Corporation (petitioner) and not those of the respondent

El Dorado Company. The facts in this connection have been explicitly set forth upon page 31 of the brief supporting the petition and respondent finds itself in no position to question the accuracy of that presentation.

Petitioner has further pointed out that during the last two months of the period covered by the suit the tariff rules contained a restrictive clause forbidding payment to a lessee such as the respondent El Dorado Company (Brief in support of petition, p. 31). Respondent now protests that this is the first time the petitioner has referred to this tariff regulation (Respondent's brief, p. 18). In this the respondent is again in error. This regulation was brought specifically to the attention of the trial court. Counsel for both parties agreed that it should be in the record, and it is in fact in the record (R. 197). The attention of the Circuit Court of Appeals was specifically directed to this tariff rule in the petition for rehearing in the Circuit Court.[1]

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(1) Respondent is in error in stating that this provision "does not affect any part of the sum sued for by respondent in the Court below" (Respondent's brief, p. 18). The fact is that the suit was brought to recover the car mileage payments collected from the railroads by petitioner "up to the 31st day of May, 1935" (R. 46). The tariff rule effective April 1, 1935, was therefore in force during two months of the period. Moreover the ledger sheets introduced in evidence by respondent include a record of car mileage earnings for the month of April, 1935, received from the carriers on May 25, 1935 (R. 183).

The assertion is incorrect that "the tariff regulations referred to on page 31 of the petitioner's brief do not in any manner affect the sum involved in this suit * * *" (Respondent's brief, p. 19). If the intended reference is

Moreover, petitioner repeatedly and explicitly contended before the Circuit Court that at no time during the period covered by the suit did the car mileage tariffs of the rail carriers provide for the payment of the car mileage allowances to the respondent El Dorado Company. The failure of the Circuit Court properly to construe the tariff provisions is doubtless attributable to the insistent contention of respondent that the car mileage tariffs provided for or permitted payment of the car mileage earnings to the El Dorado Company although in point of fact they did not so provide or permit at any time during the period embraced by the suit.

It may be added finally that respondent's attempt to find support for its case in the tariff rules is misconceived, since, as this Court declared in *Merchants Warehouse Co. v. United States*, (283 U. S. 501, 511):

> "Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form can not clothe it with immunity."

See also *Baltimore & Ohio R. Co. v. United States*, (305 U. S. 507, 524).

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simply to the tariff regulation which took effect on April 1, 1935, it is erroneous for the reasons just stated. If on the other hand the comment is directed to all of the tariff regulations reviewed on page 31 of the petitioner's brief, it is wrong in its entirety. We have attempted to make it exceedingly plain that the rules of the car mileage tariffs, in effect throughout the entire period covered by the suit, provided for payment of car mileage to the petitioner (as the car owner whose reporting marks were on the cars) and did not provide for or permit payment by the rail carriers to the respondent El Dorado Company.

D. The Agency Theory.

Respondent undertakes to defend the theory of the court that the El Dorado Company is entitled to receive the full amount of the car mileage earnings received by the car owning company (petitioner herein) from the rail carriers upon the ground that the payments were received in an agent's capacity and therefore must be paid over in their entirety to the shipper-lessee (Respondent's brief, p. 19). The attempted defense is unconvincing, and we are content by way of reply to refer to the discussion of the respondent's agency theory upon pages 32 to 34 inclusive of the brief in support of the petition. No agency in fact existed, but if it be assumed that the relation of principal and agent actually came into existence, it is plain that the provisions of the Act may not thereby be circumvented. The prohibitions of the law against rebates or concessions in any form or by any device may not be thwarted by creating an "agency" through which a shipper may obtain "monetary profits" which he could not secure directly from the rail carriers. Respondent has cited no case in even ostensible support of the agency theory.

II.

THE PLEA IN DEFENSE; SUPPORTING PROOF.

The function of pleading is to acquaint the adversary and the court with that upon which the pleader relies. Petitioner's answer raised a legal defense to the cause of

action asserted by the El Dorado Company. It averred that if it should pay over to respondent El Dorado Company "any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that * * * (the El Dorado Company) * * * would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act" (R. 18). The plea satisfied principle and precedent alike. As shown upon pages 40 and 41 of the brief in support of the petition, it served fully to acquaint the adversary and the court with the nature of the defense relied upon.

At no time, in either the District Court or in the Circuit Court of Appeals, was the adequacy of the plea challenged by the respondent El Dorado Company. It was fully understood that petitioner was contending that, by the payment to respondent El Dorado Company of any part of the excess car mileage earnings which had been withheld by petitioner, respondent would secure the transportation of its property at less than the tariff rates.

In respondent El Dorado Company's opening brief filed with the Circuit Court of Appeals it was stated (page 10):

> "The sole question at issue is whether appellee was prohibited by the cited provisions of the Elkins Act from making the said payments according to the terms of its said contract—that is to say, whether such pay-

ments, if made, would amount to a rebate, a concession, an advantage or a discrimination prohibited by the cited provisions of the Elkins Act. (R. 43, 44.)"

Again upon page 12 of the same brief for respondent it was stated that

"The sole question involved is directly raised by the pleadings."

In his opening argument before the Circuit Court of Appeals counsel for respondent stated (Tr. of Oral Argument, p. 5):

"Now, the whole question, therefore, hinges upon whether or not the payment contracted to be made by the tank car company is a violation of the provisions of the Elkins Act. *It is raised first, on the face of the answer and, second, on the face of the record.* The court held that it was." (Emphasis supplied.)

The conclusions of the District Court properly set forth the ultimate fact that payment to the respondent El Dorado Company of the excess of the car mileage earnings over rental would result in the latter's receiving transportation at less than tariff rates (R. 35). Nothing more was needed. It is now too late in any event to raise any question as to the form of the findings and conclusions (*O'Reilly v. Campbell*, 116 U. S. 418, 421).

Petitioner fully sustained its burden of proof, as shown upon pages 38 to 40 of the brief supporting the petition. This was not questioned by respondent at any time, either in the District Court or in the Circuit Court of Appeals.

Respondent now argues that it was not required to prove the legality of performance under the contract (Respondent's brief, p. 22). Petitioner has made no such contention. However, petitioner has shown that there was ample evidence of record to sustain its burden of proof in accordance with well established rules of evidence and that respondent therefore was required to produce countervailing evidence to meet the case made out by petitioner or accept an adverse decision.

The amount of the car rental payable by respondent and the amount of the car mileage accruing upon the leased cars were both shown. Respondent to the contrary notwithstanding, it was not within the power of petitioner to determine whether the respondent El Dorado Company had incurred any costs, additional to car rental, in connection with the use of the leased cars. The facts respecting such additional costs, if any there might have been, were wholly within the knowledge of respondent El Dorado Company and were not within the knowledge of petitioner. Petitioner's experience with other shippers could not serve to acquaint petitioner with the costs of such shippers, nor could such information, if obtained, serve either to establish or negative costs on the part of respondent (Respondent's brief, p. 22).

The case was presented by both parties upon the theory that the car rental payable by respondent El Dorado Company constituted its entire cost. This is not denied by respondent. While it now suggests the possibility of additional "costs and obligations" (Respondent's brief, p. 23),

explicitly refrains from showing that any such addi-
al costs were actually sustained.[1]

Without objection on the part of respondent El Dorado
mpany the case was decided by the District Court upon
basis that the car rental was the only cost to the
pondent El Dorado Company. Under well-settled prin-
es the parties could not, and they did not, adopt a dif-
nt theory of the case in the Circuit Court of Appeals.
he Circuit Court of Appeals upon its own initiative
gested the possibility of additional costs in its opinion.
s was improper. It had no foundation of record and
not responsive to any contention on the part of re-
ndent El Dorado Company. As was said in *Arkansas*
hracite Coal and Land Co. v. Stokes, (C.C.A. 8th) 2
(2d) 511, 515:

"In short, to state the rule simply and baldly, the
theory on which the case is tried *nisi* is the theory on
which it must, on appeal, be weighed for error."

e rest upon the treatment of this element upon pages
o 41 inclusive of the brief supporting the petition.
pondent has been unable to meet the authorities which
there cited and which lay down the rule that the theory
n which a case is tried and determined must be strictly
red to upon appeal.

) Respondent argues that it was required to pay car
l in advance, and thus had part of its investment
l up" until mileage could be earned. (Respondent's
, p. 23). The record shows, however, that no rental
ever paid by respondent, and that rental accrued was
riably offset by mileage earned (R. 172, 177-178).

III.

PERFORMANCE UNDER CONTRACT MUST CONFORM WITH THE REQUIREMENTS OF THE ELKINS ACT.

Upon pages 41 to 43 of the brief supporting the petition we cited cases to the principle that when the performance of a contractual undertaking is found to be in conflict with the Elkins Act, the enforcement of the contract must yield to the enforcement of the Act. Respondent offers no countervailing authorities.

CONCLUSION.

As respondent would now have it, petitioner is merely seeking to escape its obligations to respondent to pay over mileage earnings (Respondent's brief, p. 24). The fact is, and the parties so recited in their written stipulation (R. 45, 47-48), that petitioner faithfully paid over the excess mileage earnings to respondent El Dorado Company until admonished by the ruling of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, *supra*, that the practice was unlawful. Thereafter respondent was credited with car mileage earnings in amounts equalling its car rental, and only the excess was withheld.

The ruling of the Circuit Court of Appeals in the instant case is opposed to the decisions in all other cases arising under cognate circumstances. Respondent has been unable to produce an authority affording support for the novel doctrine announced in this cause. We are satisfied that no such authority exists.

The public importance of the issue here submitted is clear. The rule announced by the Circuit Court of Appeals in this cause should not be permitted to fix standards for the guidance of carriers, car owning companies and shippers in connection with the use of privately owned cars. Judicial sanction should not be given to the use of privately owned cars as a means by which shippers may secure rebates, concessions and advantages.

Respectfully submitted,

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Dated at San Francisco, California, August 30, 1939.